HARVARD
LAW REVIEW.

VOL. VII. FEBRUARY 25, 1894. NO. 7.

RESPONSIBILITY FOR TORTIOUS ACTS: ITS HISTORY.— II.

Harm Done by Servants and other Agents: 1300–1850.

IN a former article[1] we found that the primitive Germanic idea was that the master was to be held liable absolutely for harm done by his slaves or servants; that, in later Germanic times, the master could exonerate himself by surrendering the offending person, and at the same time taking an exculpatory oath, "se non conscium esse," "quod pura sit conscientia sua;" that, on English soil, in the early Anglo-Norman period this idea of responsibility appears in the shape of exoneration for deeds of the servant not commanded or consented to; but that in that period the test of Command or Consent had hardly begun to be applied to responsibility in what we now term its civil aspect,[2] and, while common in penal matters, was by no means fixed in its scope. The subsequent development of the idea we may now take up in three stages: (1) the period beginning with Edward I.'s time, 1300 *circa;* (2) the period beginning with Lord Holt's time, 1700 *circa;* (3) the period beginning with Lord Kenyon's time, 1800 *circa.* Speaking provisionally and roughly, these stages stand for the

[1] Vol. vii. p. 315.

[2] We find as late as Finch's Law (1654; ed. 1759, p. 198) the statement, "trespass is a criminal offence punishable by a fine unto the king;" and it is perhaps unsafe to draw any distinction of "civil" and "criminal" in the present connection till the seventeenth century.

following phases: (1) the extension of the Command or Consent test to civil responsibility; (2) the test of Implied Command from General Authority; (3) the test of Scope of Authority or Course of Employment. We may now take up the evidence of this development.

I.

It will be apparent, it is believed, to one who studies the following cases [1] that for a century or so the undercurrent of feeling was still that the master bore responsibility for his servant's doings; that the extension of the Command test had to make its way against what may be called the presumption to the contrary, and that it came first in cases (such as fraud) more nearly related to the sort of conduct to which it was already recognized to apply, *i. e.* morally reprehensible, criminal acts;[2] and that it can hardly be found to be accepted as a general rule in trespass, etc., until early in the sixteenth century.

1302. *Y. B.* 30–31 *Edw. I.*, 532 (Rolls ed.). — Hugo is charged with rape. *Duodecim:* "Nos dicimus quod ipsa rapiebatur vi per homines domini Hugonis." *Justiciarius:* "Fuit ne Hugo consentiens ad factum vel non?" *Duodecim:* "Non." . . . *Justiciarius:* "Hugo, quia ipsi vos acquietant, nos vos acquietamus."

1302. *Y. B.* 30–31 *Edw. I.*, 203 (Rolls ed.). — A poor woman complained of frequent distresses by B. The inquest "said that the woman's son, who was of her mainpost [household], had done damage in B.'s wood." Berrewik, J.: "And inasmuch as he did wrong to distrain the woman for [the deed of] her mainpost," B. was found guilty.

1305. 33 *Edw. I.*, 474 (Rolls ed.). — Writ of covenant by Henry de Bray, a tenant against his landlord, a knight, for disseisin. The inquest found that the knight's lady had come with her friends, and the plaintiff, departing in fear, left her in possession "without that Master Henry was ousted by the knight himself or his counsel." The Court held that, "inasmuch as the deed of the wife is the deed of the husband, it is awarded that Master Henry recover these damages of 100 marks."

1306. *Y. B.* 34 *Edw. I.*, 252 (Rolls ed.). — Trespass for taking beasts; justification as bailiff of the abbot of W. Tondeby, for plaintiff: "You cannot say that; for the abbot himself is also named in this writ, and he has already pleaded and said not guilty; and since he in whose name you have acknowledged the taking has disavowed it, [we pray] judgment

[1] Which include, perhaps, not all that are on record, but all that the writer has found, and apparently all that judges and counsel have relied on in decision and argument.

[2] See note 2, p. 383.

and damages." [Here apparently the disavowal of complicity was regarded as sufficient evidence for the abbot under "not guilty;" as Bracton declares, *ubi supra* (p. 334)].

1353. *St.* 27 *Edw. III.*, 2, *c.* 19. — "No merchant nor other, of what condition that he be, shall lose or forfeit his goods nor merchandizes for the trespass and forfeiture of his servant, unless he do it by the command or procurement of his master, or that he hath offended in the office in which his master hath set him,[1] or in other manner that the master be holden to answer for the deed of his servant by the law merchant, as elsewhere is used." [Apparently this is the first positive modification in civil matters. Here, as often elsewhere, mercantile convenience is earliest in calling for new adjustments.]

1401. *Beaulieu* v. *Finglam*, Y. B. 2 H. IV., 18, pl. 6. — Action for damage caused by the defendant's fire.[2] Markham, J.: "A man is held to answer for the act of his servant or of his guest in such a case; for if my servant or my guest puts a candle on a beam, and the candle falls in the straw and burns all my house, and the house of my neighbor also, in this case I shall answer to my neighbor for the damage which he has, quod concedebatur per curiam." Hull, for the defendant: "That will be against all reason to put blame or default in a man where there is none in him; for negligence of his servants cannot be called his feasance." Then the traditional misfortune-liability is cited in answer. Then Markham, J.: "I shall answer to my neighbor for him who enters my house by my leave or my knowledge, or is entertained by me or by my servant, if he does, or any one of them does, such a thing . . . ; but if a man from outside my house, against my will, puts the fire . . . for that I shall not be held to answer to them, etc., for this cannot be said to be through ill-doing on my part, but against my will."

1431. 9 *H. VI.*, 53, *pl.* 37. — Action for selling bad wine. Plea, that he sold it through his servant. Martin, for the plaintiff: "Of your own knowledge you have deceived him (the plaintiff)." Rolf, for the defendant: "If I have a servant who is my merchant, and he goes to a fair with an unsound horse to sell it, shall the party have an action of deceit against me? No." Martin: "You are right; for you did not order him to sell the thing to the other, nor to any particular person; but if your servant by your covin and commandment sells bad wine, [the buyer] shall have action against you; for it is your own selling; and if the case is that you did not command your servant to sell to that person, then you may allege that you did not sell to the plaintiff." [The decision is not given; but the precedent has been accepted in the sense of Martin's statement of the law. Cf. Danvers' Abr., "Act. on Case," fol. 184;

---

[1] For the presence of this clause and the significance of its phraseology, see *infra*, p. 19, note 2.

[2] The translation is that of Mr. Justice Holmes.

Lilly's Practical Register, "Disceit;" and the arguments in later cases.]

1443. 21 *H. VI.*, 39, *pl.* 6. — Trespass for grass trodden and spoiled by the defendant's beasts. Markham for defendant: "We say that the plaintiff, with the intent of damaging the defendant, commanded one of his own servants to drive the defendant's beasts into the [plaintiff's] grain, wherefore he [the servant] by his commandment drove them into the said grain, and the defendant, as soon as he had notice of it, drove them out of the said grain and grass." Yelverton for the plaintiff: "This plea amounts only to not guilty; for if one by my covin and commandment takes the goods of another person, or beats him by my commandment, the writ is maintainable against him who did it and me . . .; thus here by his [the defendant's] own statement the plaintiff himself did the trespass . . ."

1471. 10 *Edw. IV.*, 18, *pl.* 22. — Trespass for false imprisonment; plea, that the defendant handed the plaintiff over to the authorities; objection, that he was still responsible for the subsequent letting at large. Choke, J.: "And if the defendant had delivered the plaintiff to jail by [the hands of] his servant or other man, who had suffered the plaintiff to go at large, etc., never should the plaintiff have action against the defendant, etc., *quod curia concessit.*"

1472. 11 *Edw. IV.*, 6, *pl.* 10. — Action of deceit on a guarantee as to the length of cloth bought of the defendant. Plea, that the cloth was B.'s, and was sold by the defendant as servant of B. Choke, J.: "Here the sale is the sale of the master, and the guaranty the act of the servant, wherefore on this guarantee I shall not have an action against the servant. If a man takes upon himself to cure me of a certain illness, if he gives such medicine that I am injured, I have an action on my case against him; but if he undertakes as above, and then commands [maunde: order, command] his servant to administer the medicine to me, and he emplasters or medicates me, by which I am injured, I shall not have an action against the servant, but against the master. And so if he undertakes to shoe my horse, and orders [his] servant [to do it] who 'nails' [the horse], the action lies against the master." Littleton, J., was opposed: "Although this sale is the sale of the master, yet it is done by the servant," etc. Brian, J., agreed with Choke: "But, sir, it seems that the action of deceit does not lie in this case, for it is the sale of the master."

1497. *Keilwey*, 3 b. — "Where my wife or my servant, without my knowledge, puts my beast on another's land, who brings a writ of trespass against me for depasturing his grass with my beasts, — if I plead not guilty, I cannot give the special matter in evidence, because it is contrary to the issue . . . which was conceded by the whole court. And it was besides said at the same occasion that where my beasts, of their own wrong, without my will and knowledge, break into another's close, I shall

be punished, for I am the trespasser with my beasts, which was also agreed to as law, because I am bound by law to keep my beasts without doing harm to any one." [Here the significance of the Consent test is emphasized by the "diversity" stated.]

1498. 13 *H. VII.*, 15, *pl.* 10. — "It was held in Common Bench, if my servant, against my desire, chases my beasts into the land of a stranger, I shall not be punished for this, but my servant; otherwise if my beasts escape against my desire, for I shall there be punished. *Quære*, if I keep a dog, and my servant against my desire incites and causes the dog to bite and kill the beasts of a stranger, whether I shall be punished for this."

1505. 20 *H. VII.*, 13, *pl.* 23. — Trespass for false imprisonment; justification as bailiff by command of the sheriff under a writ; the sheriff had neglected to return the writ, and this was objected to as defeating the plea. Rede, C. J., "to the contrary. For there is no default in the bailiff. . . . For suppose that the master commands the servant to distrain, and so he does it and takes [the distress] to his master, and the master misuses it, is it reason to punish the servant? No, surely; and so no more here. And if the master commands the servant to distrain, and the servant does so, it is not reason, if the servant misuses the distress, that the master should be punished by cause of his command, which was lawful in the beginning; wherefore, on the other hand, [in this case also] the law should be all one."

1506. 21 *H. VII.*, 22, *pl.* 21. — Same facts as in 20 H. VII., *supra;* probably the same case adjourned. Rede, C. J., holding the defendant excused "since every bailiff and every servant is bound to do the precept of his master in all that is legal," and showing that "there is a defendant in his master, in whom the default is," says: "As if I command my servant to take a distress for my rent, and he does it and leads the distress to me, and I kill it, or do other illegal thing with it, in this case the servant is excused; and, on the other hand, where I command my servant to take the distress legally, and, he rides on the distress, in this case he shall be punished, and I excused, for that when I command him to do a thing legally, and he does contrary to the commandment, he does a wrong to which I did not assent [agrea]; it is reason to punish him and to excuse me, and so here. . . ."[1]

---

[1] Cf. 8 *Edward IV.*, 17, *pl.* 24 (1469); where the general understanding seems clearly in accord; and the doctrine of cases like 11 *Henry IV.*, 91, *pl.* 47 (1410); where, on the defendant's writ against J., the bailiff erroneously took the horse J. was riding, which was in fact the plaintiff's, and both judges declared that the error was not to be charged against the defendant without an allegation that it was "by covin and contrivance" of him; or "at his showing or request." There is strong reason for believing that by this period the law of master's responsibility for servant had come to be regarded as merely one form of the general principle thus stated in "Doctor and Student," I. c. 9 (p. 31): "The law of England is that if a man command another to do a trespass, and he doth it, that the commander is a trespasser."

1518. *Doctor and Student*, II., *c.* 42 (Muchall's ed. 233). — "For trespass of battery, or wrongful entry into lands or tenements, ne yet for felony or murther, the master shall not be charged for his servant, unless he did it by his commandment. . . . Also if a man send his servant to the market with a thing, which he knoweth to be defective, to be sold to a certain man, and he selleth it to him, there an action lieth against the master; but if the master biddeth him not to sell it to any person in certain, but generally to whom he can, and he selleth it according, there lieth no action of deceit against the master." p. 234. — "If a man desire to lodge with one that is no common hostler, and one that is servant to him that he lodgeth with robbeth his chamber, his master shall not be charged for the robbing; but if he had been a common hostler he should have been charged. . . . But that an host or keeper of a tavern shall answer for their guests, unless it be done by their assent and commandment, I do not remember that I have read it in the laws of England."[1]

1525 *circa*. — *Treatise on Subpœna* (1 Hargr. Law Tracts, 347): "Also if a man's servant thro' negligence of his maister, tho' it be not by his commandemente or assente, but for lacke of correction, do offences and tresspasse to his neighbour, whereby the master is bound in conscience to make restitution if his servante be not able, yet there lieth no subpœna againste the master to compel him to it."

1589. *Seaman* v. *Browning*, 4 Leon. 123. — Debt on an obligation with a condition for peaceable enjoyment of lands, and a breach assigned in that trees were cut down. "It has [was?] found that a servant of the said M. [the obligor] had entred and cut them, and that in the presence of the said M. his master and by his commandement; it was the opinion of the Court that the condition was broken, and that the master was the principall trespasser."[2]

It has been suggested by Professor J. B. Ames that the notions on which rested at this period the principal's liability for another's contracts might throw light on the present question; and there seems indeed good reason for believing that the prevailing test was an analogous one, *i. e.* that the master was liable if either he had commanded the making of the contract or had accepted the proceeds, *i. e.* had assented. The writer, however, has not thought it allowable, in the demonstration of the present point, to insist on the value of the analogy. Compare, for contracts, Noy, Middleton *v.* Fowler, and Ward *v.* Evans, *infra*, and the following case: —

1307 — *Y. B.* 35 *Edw. I.* (*Rolls Ed.*) 567. In Debt against an abbot and monk on a writing of the monk only, alleging that the money and a horse sold came to the profit of the house, it was apparently conceded that where the monk was an absconder and had gone off with the things received, the abbot could not be charged "for the act of his monk."

[1] We find also in this treatise a repetition, in distorted form, of the precedent in 2 H. IV., *ante*: "If the servant keep the master's fire negligently, whereby his master's house is burnt, and his neighbour's also, there an action lieth against the master. But if the servant bear fire negligently in the street, and thereby the house of another is burnt there lieth no action against the master" (p. 234).

[2] Compare here also *Lord North's Case*, Dyer, 161 a (1557), where Lord North was

1606. *Waltham* v. *Mulgar*, Moore, 776. — Action against the owner of a privateer which captured a friendly ship. A civilian solicitor argued for an absolute responsibility of masters "in public affairs." "He who has put a ship in traffic should provide servants who will not commit public offences." But Popham, C. J., said: "Where the master put his servant to do an illegal act, the master shall answer for the servant if he mistakes in the doing of the act; but where he put his servant to do a legal act, as here to take the goods of the king's enemies, and he has taken the goods of friends, the master shall not answer. As if one sent his servant to a market to buy or sell, and he robs or kills by the way, the master shall not answer; but if he sets him to beat some one, and he kills him or mistakes the person and beats another, the master is a murderer. So with rescous or trespass."

1618. *Southern* v. *How*, 2 Rolle's Rep. 5, 26;[1] — Case for sending by the defendant's servant to the plaintiff some jewels, known to be counterfeit (worth £80, the jury said, but the price was £800), for sale to the king of Barbary, by which the plaintiff fared ill at the hands of the said king when the cheat was discovered. For the plaintiff it was argued that where the vendor knows the fault, the fact that he has a servant do it is immaterial, using (1) the Saunders Case (Comb. 473) of the poisoned apple and (2) the Bad Wine Case (9 H. VI., *ante*). The defence argues that the master did not order the servant to commit the fraud, that he was "san privity;"[2] and although a general authority to a factor suffices to charge the master, yet not if the factor commits a fraud. Then the plaintiff's counsel argued from 11 Edw. IV., 6, A, using Choke's example, of the physician and the blacksmith. To this the defence answers that the command here was not directed particularly to the plaintiff, "and thus the command is general, and no deceit was intended specially towards the plaintiff;" but, it was answered, "where damage is aimed against all in general, yet if I afterwards come [*aveigne*] to any particular man to his prejudice, yet I shall have an action. . . . But admitting that in any cases action does not lie against the master for the tort of his servant, yet here . . . he has a profession in which he ought to take servants for whom he can answer. . . . Though the servant does not follow his master's command in all points, but varies from it in some little things for the better accomplishment of his master's command, this will not change the case, for when one commands a thing to be done, he impliedly commands all means to be used for doing this."[3] Then Coventry for the

---

held liable for a bond fraudulently surrendered back by his servant to the obligor; "for the possession of the bond in him or in his servant *by his order*, was to the use of the king and he was charged to render it back."

[1] In Popham, 143, the same distinction is reported briefly, but pointedly.

[2] Compare the "se non conscium esse" of the earlier law.

[3] Here first apparently is found the suggestion of the amplified form of the doctrine as accepted in the 1700s. Compare Blackstone's language, *infra*.

defence says that the jeweller was personally guilty of no intention to commit fraud, for the jewels were worth £80. "There is a distinction between the master's command of a lawful and of an unlawful thing, as if I command my servant to disseise J. S. and he disseises him with force, I shall be punished for the force; but if I command him a lawful thing and he exceeds his authority, I shall not be punished for the excess;" citing 11 Edw. IV. 6; 9 H. VI. 53; Doctor and Student, 137; 13 H. VII., 15.[1] Mountague, C. J., agreed with Coventry "en tout." Doddridge, J., said: "One appoints his servant to sell plate for him, which is in value below the standard, — the standard is 5*s.* per ounce and the plate is worth only 2*s.*, — and he commands him to sell according to the standard [but he really sells below it]; shall the vendee not have an action on the case?" which was in effect a contrary opinion.

1625. *Shelley* v. *Burr*, 1 Rolle's Abr. 2, pl. 7. — "Action on the case does not lie against man and wife for negligently keeping their fire in their house by which the house of the plaintiff was burned, for that the action lies upon the general custom of the realm against the paterfamilias and not against a servant or a feme-covert who is in the nature of a servant."

1641. *Noy*, *Maxims*, *c.* 44. — "For murder, felony, battery, trespass, borrowing or receiving of money in his master's name by a servant, the master shall not be charged, unless it be done by his command, or come to his use by his assent.

"A man shall not be charged by the contract of his wife or his servant, if the thing come to his use, having no notice of it. But if he command them to buy, he shall be charged, though they came not to his use, or had notice thereof.

"If I command my servant to distrain, and he doth ride on the distress, he shall be punished, not I.

"If a man command his servant to sell a thing that is defective, generally to whom he can sell it, deceit lieth not against him; otherwise if he bid him sell it to such a man it doth."

1668. *Cremer* v. *Humberton*, 2 Keb. 352. — "The high-sheriff and under-sheriff is one officer; and if one delivers white acre on *habeas facias poss.* of black acre, the high-sheriff is chargeable, but otherwise of a common servant, who is a trespasser, if he take one man's goods as another's for which I sent." [An example of the Particular Command doctrine.]

1677. *Michael* v. *Alestree*. — Action for bringing ungovernable horses to be trained in Lincoln's Inn Fields, whereby the plaintiff was injured; the horses were actually taken there by a servant of the defendant. The chief discussion was as to the general liability for so using horses. It is then said, in 2 Lev. 172: "It shall be intended that the master sent the

[1] The citation of these authorities, all found *ante*, shows the continuity of doctrine.

servant to train the horses there;" in 3 Keb. 650, "The master is as liable as the servant if he gave order for it."

1685. *Kingston* v. *Booth*, Skinner, 228. In an action of trespass for assault, battery, and wounding, "these points were ruled by three of the justices. . . . Secondly, If I command my servant to do what is lawful, and he misbehave himself, or do more, I shall not answer for my servant, but my servant for himself, for that it was his own act; otherwise it was in the power of every servant to subject his master to what actions or penalties he pleased. Thirdly, If I command my servant to do a lawful act, as in this case to pull down a little wooden house (wherein the plaintiff was . . .) and bid them take care they hurt not the plaintiff, if in this doing my servants wound the plaintiff, in trespass of assault and wounding brought against me, I may plead not guilty, and give this in evidence, for that I was not guilty of the wounding, and the pulling down the house was a lawful act."

In view of the almost uniform language of Courts, counsel, and text-writers in these records of the sixteenth and seventeenth centuries, it seems necessary to believe that the test, as it came to be accepted in those centuries, was none other than that of Command (*i. e.* before the deed) or Consent (Assent) (*i. e.* before or after the deed). In one specific case it is fairly clear that, for reasons not here important, and not now needing to be set out, the old strict liability continued down through the seventeenth century, viz., the case of a fire started by the servant within the house. But apart from this exceptional case, and possibly one or two others involving the persistence of extraneous traditions, it may be inferred that the Command or Consent test was the natural and universal one. Moreover, it accords perfectly with the notions which we have found to characterize the later Germanic and the early Anglo-Norman periods, being the natural form of their orderly development.

Harmonizing with and corroborating the general rule, are two subsidiary rules, worth noting by way of evidence: (*a*) The rule that the command of the master excused the servant. It does not necessarily follow, of course, that where the servant had no command to plead in excuse, there the master would *not* be liable (though, as above indicated, that was in fact the rule); but the cases on pleading command in excuse are useful in indicating how common and natural that test was, and in thus corroborating the applicability of the corresponding test in suits against the master.[1]

[1] Among the cases in point may be noted (1441) 19 H. VI. 50 pl. 7; (1463) 2 Edw.

(*b*) The rule of pleading that the replication in denial *de injuria sua propria*, when made in answer to a plea of justification as servant under the command of a master, was proper only where the justification consisted in a command merely, without any claim of interest in property (Crogate's Case).[1] That a master's command, as above in (*a*), was generally a sufficient excuse is clearly implied in this rule, and we have here a corroborative effect of the same sort.

In the cases in the sixteenth and seventeenth centuries (notably in Southern *v.* How, Cremer *v.* Humberton, Kingston *v.* Booth, also in Noy and Doctor and Student, all pointing back to the idea in the 9 H. VI. case) appears the refinement which may be termed the doctrine of Particular Command, *i. e.* the doctrine that the master, to be liable, must have commanded the very act in which the wrong consisted (unless the command had been to do a thing in itself unlawful). It was somewhat by way of a reaction against this refinement that the form of the rule began to change under Lord Holt; and to this next stage we now come.

2.

We may here pause for a moment to consider the situation at this time. It is obvious that the Particular Command doctrine, if pushed to its logical extreme (as it was apparently coming to be), must have resulted in putting very narrow limits on the principle of responsibility for servants' and agents' doings. The doctrine would require, in effect, that the master should be liable (unlawful errands apart) only when the deed in all its details had been expressly and specifically commanded; and the arguments in Southern *v.* How, *supra*, suggest the practical consequences of such a rule. Now, whether or not such a limited rule would have been desirable, it is certain that the circumstances of the time forced upon the judges a serious consideration of the expediencies of such a rule. The nation was reaping in commercial fields the harvest of prosperity sown in the Elizabethan age and destined to show fullest fruition in the age of Anne. The conditions of industry and commerce were growing so complicated, and the original

IV. 5, pl. 10; (1481) 21 Edw. IV. 5 pl. 10; (1678) Mires *v.* Solebay, 2 Mod. 244. This notion began to be repudiated in (1694) Sands *v.* Childs, 2 Lev. 351, and (1701) per Lord Holt, in Lane *v.* Cotton, 12 Mod. 472, 488.

[1] 8 Rep. 66 (1608).

undertaker and employer might now be so far separated from the immediate doer, that the decision of questions of masters' liability must radically affect the conduct of business affairs in a way now for the first time particularly appreciated. · A time had come when persons administering the affairs of others could no longer be classed indiscriminately as "servants," at the beck and call of the master for each bit of work, — a time when in social development the position of a factor or agent vested with more or less authority and discretion was in fact no longer that of a servant.[1] It was therefore natural that the judges should find themselves forced to consider (1) the practical expediency of the traditional test of liability, (2) if they should revise it, the expression and presentation of the test as revised. On the first point, it is clear that they

---

[1] Mr. Justice Holmes has shown (IV. Harv. L. Rev. 361; V. id. 6–9) how the early law knows only "servants," and how the "agent" is a later branching off from this class. The same thing has been additionally shown by Mr. Charles Claflin Allen, in the current *American Law Review* (vol. 28, p. 18). According to Murray's Dictionary, "agent" first appears in the commercial sense in Marlowe and Shakspeare. It may fairly be claimed that Shakspeare has in mind the rule of his day, when (applying it, to be sure, to a case of moral, not legal, responsibility) he introduces the following colloquy: —

King Henry the Fifth, IV. 1: (One of the soldiers has been expressing forebodings as to the fatal outcome of the morrow's battle) *Williams:* ". . . Now if these men do not die well, it will be a black matter for the king that led them to it. . . ." *King Henry* (in disguise): "So, if a son that is by his father sent about merchandise do sinfully miscarry upon the sea, the imputation of his wickedness, by your rule, should be imposed upon the father that sent him; or if a servant, under his master's command transporting a sum of money, be assailed by robbers, and die in many irreconciled iniquities [that is, meet sudden death without a chance to get absolution for past sins], you may call the business of the master the author of the servant's damnation. But this is not so; the king is not bound to answer the particular endings of his soldiers, the father of his son, nor the master of his servant; for they purpose not their death when they purpose their services." This is fairly an application of the doctrine of Particular Command.

It seems that the laws of Massachusetts Colony indicate a state of society in which the masters were still looked to for servants' torts, even where not commanded, — Brunner's thesis being illustrated, that the liability follows and depends on the power of control and correction.

1646. *Laws and Liberties of Mass.*, 1660. Tit. "Burglary & Theft" (Whitmore's ed. 127). — "[Penalty imposed for robbing orchards and gardens:] And if they be children or servants that shall trespass herein, if their parents or masters will not pay the penalty before exprest, they [the servants] shall bee openly whipped." [Re-enacted in General Laws of 1672, s. v.]

1678. Law of Mass. Co.'s Council, Mar. 28, 1678 [Whitmore's Colonial Laws, 349]. — "[A penalty for shooting off a gun near any house or highway, and the offender to make full satisfaction to injured persons.]" "And where either they be servants or youths under their parents or masters, and shall not be able to make such satisfaction, such parents or masters shall be liable to make full and due satisfaction in all respects."

did in effect revise it. They determined (whether rightly or wrongly need not be here considered) that practical expediency could not put up with the logical consequences of the Particular Command test.[1] As to the second point, the new phrasing, there was much uncertainty for a time, indeed for a century or more; but naturally enough the existing test was laid hold of and modified to suit their needs; and after all it was in itself fairly adapted to answer for the test which they thought just.[2] The test now became what may be termed the rule of Implied Command from a General Command or Authority. At the same time, amid the general reconsideration, other phrasings of the test were sometimes vouchsafed. "Whoever employs another is answerable;" "acting in the execution of authority;" "acting for the master's benefit;" "being about the master's business," — these appear as tentative expressions in the general effort to re-state on a rational basis. But the old test, in its broader scope, is still dominant in the last half of the new century.

1691. *Boson* v. *Sandford*, 2 Salk. 440; 3 Mod. 321. — The question was whether the owners of a ship were responsible for goods received by the master and spoiled by his negligence. Holt, C. J.: "The owners are liable in respect of the freight and as employing the master; for whoever employs another is answerable for him, and undertakes for his care to all that make use of him."

1698. *Tuberville* v. *Stamp;* action for a fire started by the defendant's servant in a field. Skinner, 681: It was argued by the defence that "it does not appear in this case to be done by the command of the master, and then it being out of his house he is not responsible."

Comb. 459. Holt, C. J.: "And though I am not bound by the act of a stranger in any case, yet if my servant doth anything prejudicial to another, it shall bind me, where it may be presumed that he acts by my authority, being about my business."

1 Ld. Raym. 264: Holt, C. J.: "So, in this case, if the defend-

---

[1] Lord Holt's judgments show this point of view; but the following passage of Lord Hardwicke's (Boucher *v.* Lawson, (1734) *infra*) is perhaps the most pointed brief one: "This case seemed at the trial of very great consequence, as it concerns on the one side . . . the security that persons have in trusting their gold, . . . and on the other side, as it concerned the security of owners of ships that they might not be charged by the default of their masters further than reason requires."

[2] Not that they fully appreciated the historical perspective and the significance of the situation; but one may gather from all said and done the meaning of events. We are dealing, not merely with the progress of a rule, but also with the development of an idea.

ant's servant kindled the fire in the way of husbandry, and proper for his employment, though he had no express command of his master, yet the master shall be liable . . . ; for it shall be intended that the servant had authority from his master, it being for his master's benefit."

1699. *Middleton* v. *Fowler*, 1 Salk. 282. — Case against owners of a stage-coach for a trunk taken on by the driver, but lost. Holt, C. J., said that a stage-coachman was not here within the custom of carriers, and adds, as to the receipt of money by the driver, "no master is chargeable with the acts of his servant, but when he acts in execution of the authority given by his master, and then the act of the servant is the act of the master."

1699. *Jones* v. *Hart*, 2 Salk. 441. — Holt, C. J., allowed recoveries against the master(1) where a pawnbroker's clerk took a pawn and lost it, and the owner demanded it; (2) where A's servant with his cart ran against another cart; (3) where a carter's servant ran over a boy with the cart. "The act of a servant is the act of his master, where he acts by authority of the master." (Holt, 642.)

1709 (?). *Hern* v. *Nichols*, 1 Salk. 289. — Deceit for cloth of wrong quality; the deceit was in defendant's factor beyond sea. "Holt, C. J., was of opinion that the merchant was answerable for the deceit of his factor, though not *criminaliter*, yet *civiliter;* for seeing somebody must be a loser by the deceit, it is more reasonable that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger." [1]

1722. *Armory* v. *Delamirie*, 1 Stra. 505. — Where an apprentice converted a jewel handed to him for weighing, "the action well lay against the master, who gives a credit to his apprentice and is answerable for his neglect." (Pratt, C. J.) [2]

1734–6. *Boucher* v. *Lawson*, Lee's Hardwicke, 85, 194. — A ship-master took on gold at Portugal, contrary to Portuguese law, and on arrival in London it was missing. Counsel for defendant: "If the servant of a carrier carry goods without the privity of his master, or his receiving a reward for taking them, the master is not chargeable. . . . A master is not

---

[1] Here may be noted (1704) Ward *v.* Evans, 2 Salk. 442. A servant took a bill on W. instead of cash, in payment. Held, not binding. "The acts of a servant shall not bind the master, unless he acts by authority of his master," "but acquiescence . . . will make the act of the servant the act of the master." Also, "It is more reasonable that he should suffer for the cheats of his servant than strangers and tradesmen." Sir Robert Wayland's Case, per Lord Holt, 3 Salk. 234. In Lane *v.* Cotton, (1701) 1 Salk. 17, 12 Mod. 477, where the postmaster was sued for the loss of a package by a clerk, the case was argued on the effect of a statute and on the peculiar position of a public officer.

[2] Under very similar circumstances the master was held responsible in Mead *v.* Hammond, 1 Stra. 505 (1722) by Pratt, C. J.; and in Grammar *v.* Nixon, 1 Stra. 653 (1726) by Eyre, C. J., the master was made responsible for a false warranty; no reasons being given in either case.

answerable for the acts of his servant but where he acts in execution of any authority given him by the master. . . . My servant sells false stuff without my commanding it; no action lies against me; otherwise if by my commandment." Counsel for plaintiff: "As to the master's not being liable for his servant but in the exercise of his trade, this is in the master's trade, for it is the trade of the owners of ships to carry goods;" citing Choke's case of the horse-shoer in 11 Edw. IV., *ante.* Hardwicke, C. J., decides for the defendants. ". . . It deserves to be considered whether, if a ship be sent for a particular purpose, and not in the general way of trade, the master can take in goods to charge the owners. . . . For anything that appears in this case, this might be a ship sent to Lisbon for a special purpose, and if so, no one can say that the master, by taking in goods of his own head, could make the owners liable. . . . This is no reason why these cases should be carried any further than they have been already."[1] [Do we not here see a temporary inclination to draw the line at further extension of the revised doctrine?]

1758–65. *Blackstone, Comm.*, I. 429. — "As for those things which a servant may do on behalf of his master, they seem all to proceed upon this principle, that the master is answerable for the act of his servant, if done by his command, either expressly given or implied: *nam qui facit per alium facit per se.* Therefore, if the servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it. If an inn-keeper's servants rob his guests, the master is bound to restitution; for as there is a confidence reposed in him that he will take care to provide honest servants, his negligence is a kind of implied consent to the robbery; *nam qui non prohibet, cum prohibere possit, jubet.* So likewise if the drawer at a tavern sells a man bad wine, whereby his health is injured, he may bring an action against the master; for although the master did not expressly order the servant to sell it to that person in particular, yet his permitting him to draw and sell it at all is impliedly a general command.

"In the same manner, whatever a servant is permitted to do in the usual course of his business, is equivalent to a general command. . . . A wife, a friend, a relation, that use to transact business for a man, are *quoad hoc* his servants; and the principal must answer for their conduct; for the law implies that they act under a general command; and without

---

[1] In 1733 (Commons Journal, 277; Abbott on Shipping, 12 ed., Pt. IV., c. VII. 2, p. 339), in consequence of the claim made for the plaintiff in Boucher *v.* Lawson, a petition of merchants was presented to the House, setting forth the discouragement to commerce if owners were held liable for goods made away with by masters and mariners "without the knowledge or privity of the owner or owners," and a statute was passed (7 Geo. II. c. 15) exonerating them from being answerable for merchandise "made away with by the master or mariners without the privity of the owners" beyond the value of vessel and freight. This illustrates how the mercantile community noticed the broader scope of the revised rule as now substituted by the Courts for the traditional test of Particular Command (*i. e.* direct privity).

such a doctrine as this no mutual intercourse between man and man could subsist with any tolerable convenience. . . . [As to a servant's negligence], in these cases the damage must be done while he is actually employed in the master's service. . . . [In conclusion] the reason of this is still uniform and the same, — that the wrong done by the servant is looked upon in law as the wrong of the master himself; and it is a standing maxim, that no man shall be allowed to make any advantage of his own wrong." [1]

Attention may here be called to —

1. The form and phrasing of the test. From the arguments in Boucher *v.* Lawson and the passages of Blackstone, it may easily be seen how the idea of Express Command was naturally enlarging itself into that of Implied Command, a Command to be implied or posited from a general commission to do a class of acts. "Whatever a servant is permitted to do in the usual course of his business," says Blackstone, "is equivalent to a general command." "Where he acts in execution of any authority," says counsel in Boucher *v.* Lawson; and this is the dominant phrase with Lord Holt. "It may be presumed that he acts by my authority, being about my business," is another phrase of his. The new terms are natural enough and hardly call for explanation. It may be suggested, however, that "authority" was particularly easy of adoption because about this time it seems to have had, as a primary sense, the concrete meaning of a specific order (not merely the power itself, abstractly regarded).[2] As the full meaning of the situation was realized, it was inevitable that the broader terms "scope of authority," "exercise of trade," "course of employment," should prevail; but this was not yet to be.[3]

---

[1] Compare here, also, (1773) Barker *v.* Braham, 3 Wils. 368, — an action allowed against client and attorney for an arrest made by an error of the latter. De Grey, C. J.: "They say, whoever procures, commands, assists, assents, etc., is a trespasser; here the client commands the attorney, the attorney actually commands the sheriff's officer; the real commander is the attorney, the nominal commander is the plaintiff in the action. . . ."

[2] Cf. Brandon *v.* Peacock, Lee's Hardwicke, 86 (1730): "A person put tobacco on a ship, the master ran away with the ship and tobacco, the goods being insured, the person that owned the tobacco applied to the insurance office and received the value of it. The insurance office took *an authority* from him to sue the owner, and the C. J. held that the action lay."

[3] One might fancy that the phrase of the St. 27 Ed. III. *ante*, "offended in the office in which his master hath set him," supplies an antecedent for these phrases. But it would seem that "office" was purely a civil or canon (not Roman) law phrase. In Doct. and Stud. (II. c. 42) the civilian, asking for the English law, gives as a part of his

2. The reasons offered for the rule. As already remarked, we find first under Lord Holt an effort to put the rule on a rational footing,[1] — an effort which, owing to inherent difficulties, has not yet by any means ceased. Usually some definite ground of policy, more or less tenable, was offered. Lord Holt's reasons are in substance covered by his brief sentence in Wayland's Case, *ante*: "It is more reasonable that he should suffer for the cheats of his servant than strangers and tradesmen," because it is he (Hern *v.* Nichols) who "puts a trust and confidence in the deceiver," and (Armory *v.* Delamirie, per Pratt, C. J.) "gives a credit" to him. Blackstone, tracing the harm back to the original command of the master, says "no man shall be allowed to make any advantage of his own wrong." Lord Hardwicke (Boucher *v.* Lawson) tries to strike a fair balance between the "security" which others ought to have who trust the servant and the "security" which masters ought to have from wayward employees. But very often the judicial mind gave up the troublesome task of accurately expressing a reason, and, quite content with the policy of the rule, took refuge, when it came to naming a reason, in a fiction or other form of words. "The master undertakes for the servant's care," said Lord Holt, in Boston *v.* Sandford; which of course is not true. The favorite expressions of this sort, however, were "the act of the servant is the act of the master," when done in execution of authority (Middleton *v.* Fowler, Jones *v.* Hart, *ante*) and "*qui facit per alium facit per se*" (Blackstone, *ante;* Laugher *v.* Pointer, *post*); and perhaps "*respondeat superior*" has often been used thus to evade giving a clear reason. Now here it must be noticed that there are different ways of employing a fiction. One is to accept as a guide a traditional element which no longer answers to the notions of the day and to insist upon its use; as when the loss and finding are alleged in trover, or the loss of service in seduction.

---

own test, "when the household offendeth in any office or ministry that the master is the chief officer of;" and the writer has not found the phrase elsewhere than in that book and in the above statute. In the latter it may easily have been inserted by some clerical secretary learned in the canon law.

A test once ventured in 1698 (Tuberville *v.* Stamp, as in 1 Ld. Raym. 264) was that the act should be "for the master's benefit;" and in the present century this phrase has played some part, though generally in subordination to and supplementary to the "scope of employment" test (Bush *v.* Steinman, *infra;* and *passim*).

[1] E. g. in Beaulieu *v.* Finglam (1401), *ante*, the Court harshly refuses to argue the question of expediency.

In the former case the allegation is now recognized as a pure and ineffectual fiction; in the latter, except by a few statutes, the loss of service must still be proved, though the whole basis of the claim rests to-day on other notions. A very different way is to employ a fiction to sanction a rule which we thoroughly believe in, but lazily prefer to evade accounting for openly and rationally. Of this sort is the instance in hand. Sometimes, as where in a document under seal the seal is said to presume a consideration, we borrow some kindred doctrine and force it to our present use; but sometimes, as here, we put forth a phrase not already used for the purpose, but now found very handy. So that what we have to remember about the employment of the above fiction of Identification, in the history of the present doctrine, is, (1) that it was merely a reason, an easy, lazy reason, which was put forth to sanction and support a rule of whose practical expediency the Courts were perfectly satisfied; (2) that it was merely one of several reasons, and by no means the most common, and that, in short, the rule would have stood substantially as it does now, if all reference to the Identification fiction were wanting.[1]

3.

In what may be taken as the next stage, the balance is seen to change gradually; the Command test disappears as a regular one, and "scope of employment" and its congeners come into full control. The opinions of Lord Kenyon seem chiefly to mark the change (though his language is not uniform). Savignac *v.* Roome and Stone *v.* Cartwright show the rivalry with particular clearness.

---

[1] Mr. Justice Holmes, in IV. Harv. L. Rev. 345–364, and V. id. 1–23, believes that the identification fiction plays a leading part in earlier history; but he has apparently been able to find before 1700 only five or six instances, not all unambiguous. The plain one from West's Symboleography clearly owes its origin to the civil law (as does a great deal throughout the book). West's "by some bond he is fained to be all one person," is the borrowing of a notion well known across the water: "Eadem est persona domini et procuratoris. Eadem, inquam, non rei veritate, sed fictione," etc. (Dig. 44, 2, 4, note to Elzevir ed.). Very different are the indigenous English expressions, — scarcely fictions, but merely statements of legal results; *e. g.* "the driving of the servant is the driving of the master" (Smith *v.* Shepherd). Coke says of disseisin (Co. Litt., sects. 430–435): "Where the servant doth all that which he is commanded, . . . there it is as sufficient as if his master did it himselfe, for the rule is, *qui facit*, etc." This "as if" (and Littleton says the same) shows that there is here no fiction in a proper sense, — merely a concise statement of the legal result. The out-and-out identification expressions do not come into much vogue until after Blackstone's time.

1795. *Morley* v. *Gaisford*, 2 H. Bl. 442. — Case against one whose servant negligently drove a cart against the plaintiff's chaise. A verdict was found for the plaintiff, but a motion was made in arrest of judgment that the action should have been trespass. "The Court seemed at first inclined to refuse the rule, saying that it was difficult to put a case where the master could be considered a trespasser for an act of his servant, which was not done at his command," but, after delaying for further consideration, the rule was discharged on the defendant's suggestion. [See the argument for the defendant in Brucker *v.* Fromont, 6 T. R. 659 (1796), as showing that this misconception of the earlier form of the rule was already in the air. Note that this, the first judicial misunderstanding of it (which became the basis of a special doctrine noticed later on), was in the Common Pleas, and that the King's Bench, Lord Kenyon's Court, did not exhibit it until well on in the next century.]

1795. *Savignac* v. *Roome*, 6 T. R. 125. — Case for wilfully driving, by his servant, a coach against the plaintiff's chaise. Verdict for the plaintiff. Espinasse moved in arrest, because, first, "no action could be maintained against the defendant for a wilful act of the servant, accompanied with force, unless done by command of the master," citing Jones *v.* Hart, *supra;* and, second, because the action should have been trespass. Bayley contended that it was enough if the injury was done in the course of employment; but Espinasse quoted Blackstone, *ubi supra*, and Kingston *v.* Booth, *supra*. The court made the rule absolute on the second ground, without noticing the first.

1796. *Stone* v. *Cartwright*, 6 T. R. 411. — The defendant managed a colliery as guardian; he employed a superintendent for the work, but took no personal concern in it. He was held not liable for a caving of the soil resulting from the improper removal of pillars. Lord Kenyon stated that such actions should be brought against either "the hand committing the injury, or against the owner for whom the act was done." Lawrence, J., said: "If the plaintiffs had given evidence that the defendant had particularly ordered those acts to be done from whence the damage had ensued, that would have varied the case."

1799. *Bush* v. *Steinman*, 1 B. & P. 404. — The defendant contracted with a surveyor to repair his house; the surveyor contracted with a carpenter; the carpenter employed a bricklayer; and the bricklayer's servant put a pile of lime in the road, by which the plaintiff was injured. Lord Kenyon: "The general proposition that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do seems to be too large and loose. The principle of . . . Littledale *v.* Lord Landsdale comes much nearer. . . . The work being carried on for his benefit and on his property, all the persons employed must have been considered as his agents and servants. . . . The responsibility was thrown on the principal from whom the authority

originally moved." Rooke, J.: "He who has work going on for his benefit and on his premises must be civilly answerable for the acts of those whom he employs."

1800. *Ellis* v. *Turner*, 8 T. R. 531. — Case for goods which the master of the defendant's ship refused to deliver. Lord Kenyon, C J.: "The maxim applies here *respondeat superior*. . . . The defendants are responsible for the acts of their servants in those things that respect his duty under them."

1800. *McManus* v. *Crickett*, 1 East, 107. — Action for driving a chariot against the plaintiff's chaise. Lord Kenyon, C. J.: "At the trial it appeared in the evidence that one Brown, a servant of the defendant, wilfully drove the chariot against the plaintiff's chaise, but that the defendant was not himself present, nor did he in any manner direct or assent to the act of the servant." Then following Lord Holt's phrase, "in the execution of the authority," and noting three of the earlier authorities on Command, he says: "If a servant quits sight of the object for which he is employed, and without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him." And the headnote begins: "A master is not liable in trespass for the wilful act of his servant, as by driving his master's carriage against another, done without the direction or assent of the master."

1811. *Paley on Agency:* "But the responsibility of the master for the servant's negligent or unlawful acts is limited to cases properly within the scope of his employment. . . . The responsibility of the principal is confined to acts done either under his express direction, or in his service and therefore under his constructive command. In all cases in which the frauds or injuries of servants have been held to affect their employers, it appears that the employment afforded the means of committing the injury. No wilful trespass of a servant, not arising out of the execution of his master's orders or employment, will make him responsible." [Note "in his service and therefore under his constructive command."]

1812. *Nicholson* v. *Mounsey*, 15 East, 384. — Case against the captain of a man-of-war for a collision occurring through the negligence of the lieutenant. Lord Ellenborough phrases it that the owner or master "is answerable for those whom he employs, for injuries done by them to others within the scope of their employment."

1826. In the great case of *Laugher* v. *Pointer*, 5 B. & C. 547, where the defendant had hired a coach from a stable, and the stable-keeper sent a driver with it, and a collision ensued, there is no traceable remnant of the literal form of the doctrine; all seemed ready to say, as Lord Kenyon did: "I admit the principle, that a man is answerable for the conduct of his servants in matters done by them in the exercise of the authority that he has given them."

From this time the general test is phrased as "scope" or "course" of "employment" (Sleath *v.* Wilson, 9 C. & P. 607, 1839; Story on Agency, 1839; Smith on Master and Servant, 1852), "scope of authority" (Cornfoot *v.* Fowke, 6 M. & W. 358, 1840; Att'y-Gen. *v.* Siddon, 1 Tyrwh. 41, 1830; Coleman *v.* Riches, 16 C. B. 104, 1855), or, in later times, more carefully, "in furtherance of and within the scope of the business with which he was trusted" (Keating, J., in Bolingbroke *v.* Board, L. R. 9 C. P. at 577, 1874). No attempt has been made to note here all the cases from 1800 to 1850.

Did no direct traces remain at later times of the supplanted Command test? Or was its broader substitute left in sole possession of the field after Lord Kenyon's time?

1. A very few cases are to be found in which (the judges perhaps, having been brought up under the earlier form of doctrine) a direct survival may be seen.

1828. *Goodman* v. *Kennell*, 1 Moore & P. 241. — Case for injuries from a horse ridden by the defendant's servant; the servant was a person casually employed to do an errand, who had without orders taken the defendant's horse to ride on. Park, J.: "A master would not, certainly, be liable for an act done by his servant whilst riding the horse of another, without his knowledge, or against his consent. But in the present case the question was, whether or not there was sufficient evidence of an assent or authority, either express or implied, from the defendant to C. to use the horse." Best, C. J.: "It has been truly said that a servant's riding the horse of another, without the assent or authority of the master, cannot render the latter answerable for his acts. But here the question was, whether there was not sufficient evidence to show that C. was riding the horse with the defendant's assent, and on his business." [Here we may see a transitional stage, in which "order," "assent," "authority," were for some time used indiscriminately as practical equivalents.]

1857. *Patten* v. *Rea*, 2 C. B. N. S. 606. — Action for negligently driving a horse and gig against the plaintiff's horse. On a ruling for the plaintiff, a rule *nisi* was asked for misdirection, "first, in not leaving to the jury the question whether the horse and gig driven by W. T. were used by him on his master's business, at the instance and *express* request of the defendant." The jury had found, in answer to the judge's questions, that there was no verbal request, but that T. had gone on the defendant's business, and that "the defendant knew it and assented to it." Crowder, J., the trial judge, said: "The contention was that, in order to render the defendent liable, there must be something tantamount to a command by the master. The rule is not quite correct in the use of the

word *express*." Cockburn, C. J., said, as to this: "[It is met] by the fact that the master was cognizant of the course which his servant was pursuing at the time, and did not dissent." Williams, J., said: "Now it clearly is not necessary in cases of this sort that there should be any *express* request; the jury may imply a request or assent from the general nature of the servant's duty and employment. There was ample evidence of such implied request or assent here." [1]

2. By one of those misunderstandings not infrequent in our legal system, the language of the seventeenth century became, in the eighteenth, the basis of the rule that the form of the action against the master could be Trespass in that case alone where the specific act had been commanded by him.

1849. *Sharrod* v. *R. Co.*, 4 Ex. 581. — Trespass for driving an engine over the plaintiff's sheep; the driver had been directed to go at a certain speed. The defendants objected that the remedy was case. Parke, B.: "The sending the engine along the line was the voluntary act of the Company, and they are responsible for the consequences; but the question is whether they are liable in trespass, they not having given any order for the injurious act. . . . The maxim 'qui facit per alium facit per se' renders the master liable for all the negligent acts of the servant in the course of his employment. . . . Trespass will not lie against him, . . . unless, as was said by the Court in Morley *v.* Gainsford, 2 H. Bl. 442, the act was done '*by his command;*' that is, unless either the particular act which constitutes the trespass is ordered to be done by the principal, or some act which comprises it, or some act which leads by a physical necessity to the act complained of," citing Gregory *v.* Piper. "This is the simple case of an act done by the servant in the course of his employment, not specifically ordered by the master." [2]

---

[1] Even in later cases we may find expressions which, if they are not to be traced to the same source, at least show how easily translatable the older test is to the newer.

"In the course of the service and for the master's benefit, though no express command or privity of the master be proved." Willes, J., for the Court in Barwick *v.* Bank, L. R. 2 Ex. 259 (1867). "It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts." Quoted with approval by Lord Selborne, in Houldsworth *v.* Bank, 5 App. Cas. 326 (1880).

Most of the American cases came at a time when the text-books had made the "scope of employment" or "authority" phrase the familiar one; but a few are to be found using the old language; *e. g.* McCalla *v.* Wood, Pennington (N. J.) 86 (1806). "Upon principles of law, one person can never be made liable for the trespass of another. It is true, that if one command or authorize his servant to commit a trespass, he is answerable himself; but then it is the trespass of the master, according to the well-known maxim of the law *qui facit per alium facit per se*."

[2] This case of Sharrod *v.* R. Co. was preceded in the same year by Gordon *v.* Rolt, 4 Exch. 365, in which much the same question was considered: Rolfe, B.: "To render the master liable in trespass, it must appear that he ordered the servant to do the act, and there is no evidence of that here."

But this rule began in a misconception, gradually evolved, of the earlier rules, and involves the cases *ante*, Morley *v.* Gaisford, McManus *v.* Crickett, Gregory *v.* Piper. The stages were three: (1) Morley *v.* Gaisford (1795), in the Common Pleas, initiates the above rule; but a comparison of it with Savignac *v.* Roome, *ante* (1795), and Brucker *v.* Fromont, 6 T. R. 659 (1796) indicates the prevailing principle, as administered in the King's Bench, to have been that the form of action followed the nature of the act; *i. e.* sue the master in Case where negligence of the servant is the basis of the claim, sue in Trespass for the servant's trespass. (2) In McManus *v.* Crickett, *ante* (1800), Lord Kenyon held that the master is not liable *at all* for a wilful trespass of the servant, unless done at express command, because he thus practically exceeds his authority; for his trespasses not wilful, Case lies. Of this understanding are Paley (*ante*), and Peake (p. 294), writing shortly after. (3) Then forgetfulness ensued, the opinion at the bar altered, and in (1826) Gregory *v.* Piper (9 B. & C. 591) and in (1849) Sharrod *v.* R. Co., *supra*, it was said that the master is not liable in Trespass for his servant's trespasses (*i. e.* direct acts, wilful or not), unless expressly commanded. This doctrine may well be regarded as a necessary result of the common-law theory of Trespass; but it seems on the evidence that it originally crept in through a misconception of the language of the old Command test, then becoming obsolete.[1]

John H. Wigmore.

NORTHWESTERN UNIVERSITY LAW SCHOOL, CHICAGO.

[1] The small part played historically by the identification fiction has already been pointed out. It seems necessary to suggest, with deference, that this conclusion, if true, makes grave difficulties in the way of accepting the thesis of the learned investigator already mentioned, that the fiction "that within the scope of the agency principal and agent are one" is "the survival from ancient times" of the superstitious patriarchal liability "generalized into the form of a fiction, which, although nothing in the world but a form of words, has reacted upon the law and has tended to carry its anomalies still further," and that the modern rules "depend upon fiction for their present existence." The learned writer therefore concludes that "common-sense is opposed to the fundamental theory of agency." This is not the place to offer to do what no one has yet succeeded in doing, — to phrase the feeling of justice which every man has in the more or less limited responsibility for agent's torts; but it is worth while noting that the Command or Authority principle may prove to be, theoretically as well as historically, the true support of the rule of responsibility for agents' torts. Perhaps the nearest approach to this yet made is that of Lord Brougham, in Duncan *v.* Findlater, 6 Cl. & F. 894, 910: "I am liable for what is done for me and under my orders by the man I employ, . . . and the *reason* that I am liable is this, that by employing him I set the

whole thing in motion, and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it." In other words, (1) if I command A to do act x, I ought to be liable for the natural consequences peculiar to that act taken in itself; (2) the same follows if x is a class, series, or group of acts; (3) if A does the act in a careless or otherwise wrongful way, different from that in which I expected him to do it, and not as I myself might have done it, my personal culpability is no longer clear; nevertheless, complete legal exoneration in such cases would be poor policy, for it would afford ample opportunity to shirk responsibility, merely by appointing substitutes; so that some medium must be found. If, then, I employ knowingly a careless servant, here at least I should be liable, just as for imprudently keeping a dog known to be ferocious. But even this may on practical grounds be too lenient a rule, for I may still find means of evading due responsibility under cover of that test. Public convenience then may demand that I should be liable up to a still further point, even though I select agents carefully; in other words, we may say that I employ a substitute more or less at my peril. Just as gunpowder is kept at peril, but steam-engines, through demands of industrial welfare, are not kept at peril, so there is an undefined point at which the appointment of a substitute ceases to be at peril; and in the nature of the case that point is in individual instances hard to determine. But the conflict is hardly, as the learned writer would place it, between common-sense and tradition, but between one great consideration of policy and another; and if the restraining consideration just now seems to be the weak one, it is just because, as the above-mentioned article admits, popular opinion is convinced (rightly or wrongly) that the broad rule is a "seemingly wholesome check on the indifference and negligence of great corporations." Whether for the sake of this alone we should sanction such broad limits in dealing with the general mercantile community is perhaps a slightly different question. But at any rate the whole liability, wherever it be bounded, can be discussed and expressed, it would seem, "according to the ordinary canons of legal responsibility."